

December 2004

MJI Publication Updates

Adoption Proceedings Benchbook

**Child Protective Proceedings Benchbook
(Revised Edition)**

Sexual Assault Benchbook

Update: Adoption Proceedings Benchbook

CHAPTER 7

Rehearings, Appeals, Rescissions, and Dissolutions

7.4 Appeals to the Court of Appeals

B. Time Requirements

Effective November 2, 2004, MCR 7.204(A)(1)(c) was amended. The phrase “under the Juvenile Code” was added to the first sentence in order to clarify “that the 14-day time limit for seeking an appeal from an order terminating parental rights or entry of an order denying postjudgment relief from an order terminating parental rights is limited to appeals from orders entered under the Juvenile Code.” Staff Comment to Administrative Order 2004-43.

In the May 2004 update, replace the quotation of MCR 7.204(A)(1)(c) with the following:

“(c) 14 days after entry of an order of the family division of the circuit court terminating parental rights under the Juvenile Code, or entry of an order denying a motion for new trial, rehearing, reconsideration, or other postjudgment relief from an order terminating parental rights, if the motion was filed within the initial 14-day appeal period or within further time the trial court may have allowed during that period; or”

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CHAPTER 4

Jurisdiction, Venue, & Transfer

4.11 Case Law Defining “Unfit Home Environment”

On page 101, insert the following case summary immediately before Section 4.12:

A criminal conviction is not a prerequisite to the court’s assumption of jurisdiction on grounds that a parent’s “criminality” renders a child’s home environment unfit. *In re Unger*, ___ Mich App ___, ___ (2004). In *Unger*, the respondent-father is suspected of murdering his wife, the mother of their two children, but had not been charged with or convicted of the murder at the time a petition was filed in a child protective proceeding. The Court of Appeals held that proving “criminality” did not require a prior “conviction”: the petitioner must only demonstrate that the “respondent engaged in criminal behavior by a preponderance of the evidence.” *Id.* at ___.

The respondent-father in *Unger* also argued that a finding of criminality based upon the death of the children’s mother, in the absence of a criminal conviction, violated his due process rights. The trial court agreed with the respondent-father and prohibited the petitioner from introducing evidence of the alleged murder at the trial. On appeal, the Court of Appeals indicated that during the adjudicative phase of child protective proceedings the parent’s liberty interest at stake is the interest in managing his children and the governmental interest at stake is the child’s welfare. The Court of Appeals overturned the trial court’s findings and stated:

“Rather than appropriately balancing the factors stated in *Mathews* [*v Eldridge*, 424 US 319, 335 (1976)], the trial court focused on the harm the children would suffer if deprived of their father and the potential bias respondent might incur in the subsequent criminal proceedings. As stated above, however, the children’s interest in maintaining a relationship with their father exists only to the extent that it would not be harmful to them. [*In re*] *Brock*, [442 Mich 101, 113 n 19 (1993)]. Their welfare is of utmost

importance in these proceedings, *Id.* at 115, and due process is not offended by determining whether the trial court has jurisdiction to decide whether their relationship with their father should continue. Procedural due process seeks to protect them from an *erroneous* termination of their relationship with their father, not a statutorily proper termination. See *Brock, supra* at 113.” *Unger, supra* at ____.

The Court of Appeals indicated that the trial court provided no specific reason for excluding evidence of the murder, suggesting only that evidence of the murder would violate the respondent’s due process rights. The Court of Appeals reversed and stated “whether respondent killed [the children’s mother] is highly relevant to the issue whether ‘criminality’ renders the children’s home or environment unfit.” *Id.* at ____.

CHAPTER 4

Jurisdiction, Venue, & Transfer

4.12 Court's Authority to Take Jurisdiction Over a Child Following the Appointment of a Guardian

On page 104, after the **Note** at the top of the page, insert the following text:

In *In re Zimmerman*, ___ Mich App ___ (2004), FIA filed a petition and a request to place one of respondent-mother's children, Kaleb, in protective custody. The petition alleged that the conditions leading to the prior filing of a neglect petition concerning respondent's other two children had not been rectified. The parties agreed to participate in Kent County's Kinship Program.* Under the program, respondent consented to the filing of the petition with the understanding that Kaleb would be placed with the child's paternal grandmother and a guardianship would be established. The parties agreed to a "family plan," similar to a case service plan, and, following establishment of the guardianship, FIA requested that the neglect petition concerning Kaleb be dismissed. A similar procedure was used under the program regarding one of respondent's other children, Brendan. The court dismissed both petitions concerning these two children, but respondent failed to comply with the family plan in both cases, and the guardians filed supplemental petitions requesting termination of parental rights.

On appeal, respondent argued that the referee erred in finding that the court had jurisdiction under MCL 712A.2. Respondent contended that no grounds for jurisdiction existed because the neglect petitions regarding the two children had been dismissed after the guardianships were established, and placement with the guardians meant that the children were not "without proper custody or guardianship" under MCL 712A.2(b)(1)(b).* The Court of Appeals rejected these arguments, noting that although the original neglect petitions had been dismissed, respondent was still subject to the requirements of the family plan and substantially failed to comply with those requirements. Thus, the Court concluded, jurisdiction was proper under MCL 712A.2(b)(4).

*See Section 8.2 for a brief description of this program.

*See Section 4.10, above, for discussion of this statutory provision.

CHAPTER 4

Jurisdiction, Venue, & Transfer

4.20 Transfer of Case to County of Residence

Insert the following text at the top of page 116 immediately before “**Bifurcated proceedings**”:

In *In re Zimmerman*, ___ Mich App ___ (2004), FIA filed a petition in Kent County, where both respondent-parent and child resided and the alleged neglect occurred. After the child was placed in a guardianship with a relative in Isabella County, the court dismissed the petition. When the parent failed to comply with a “family plan,” the guardian filed a supplemental petition in Kent County requesting termination of parental rights. The respondent moved to transfer the case to Isabella County, arguing that the child was not “found within” Kent County when the guardian filed the supplemental petition. The Court of Appeals concluded that the referee properly denied the respondent’s motion to transfer the case. MCR 3.926(A) states that a child is “found within the county” where the offense against the child occurred or where the child is present. Because the neglect alleged in the original petition occurred in Kent County, the child was properly “found within” Kent County for purposes of the subsequent proceedings. Moreover, MCR 3.926(B)(3) states that a child is not a resident of a county in which he or she has been placed “by court order or by placement by a public or private agency.” In addition, under MCR 3.926(B)(2), the referee properly considered ongoing child protective proceedings in Kent County involving the respondent’s other children when denying the motion to transfer the case.

CHAPTER 18

Hearings on Termination of Parental Rights

18.24 Termination on the Grounds of Failure to Provide Proper Care or Custody—§19b(3)(g)

Case Law

Insert the following text on page 408 after the case summary of *In re Trejo Minors*:

- *In re Zimmerman*, ___ Mich App ___ (2004)

Where the respondent-mother maintained suitable employment and separated from an abusive boyfriend but only “minimally complied” with the provisions of a “family plan” (guardianship plan) regarding parenting time, attending parenting classes, obtaining a psychological evaluation, undergoing counseling for depression, and obtaining new housing, the court properly terminated her parental rights.

CHAPTER 21

Appeals

21.4 Filing Requirements

Effective November 2, 2004, MCR 7.204(A)(1)(c) was amended. The phrase “under the Juvenile Code” was added to the first sentence in order to clarify “that the 14-day time limit for seeking an appeal from an order terminating parental rights or entry of an order denying postjudgment relief from an order terminating parental rights is limited to appeals from orders entered under the Juvenile Code.” Staff Comment to Administrative Order 2004-43.

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CHAPTER 2

The Criminal Sexual Conduct Act

2.6 Lesser-Included Offenses Under CSC Act

B. Applicable Statute and Three-Part Test

Insert the following text on page 110 before subsection (C):

In *People v Apgar*, ___ Mich App ___, ___ (2004), the Court of Appeals applied the three-part test outlined in *Cornell** and MCL 768.32 and determined that CSC III (victim between the ages of 13 and 16) is not a necessarily included lesser offense of CSC I. In *Apgar*, the defendant was charged with two counts of CSC I: one count was based on penetration by an offender who is armed with a weapon or an instrument that the victim reasonably believes is a weapon, MCL 750.520b(1)(e), and one count was based on penetration by an offender who is aided or abetted by one or more other persons, and where the offender uses force or coercion to accomplish the act of sexual penetration, MCL 750.520b(1)(d). After the jury had been selected, the prosecutor moved to amend the felony complaint to include a charge of CSC III, MCL 750.520d(1)(a) (victim between the ages of thirteen and sixteen). The trial court denied the motion. However, the trial court subsequently provided a jury instruction on CSC III, and the jury found the defendant guilty of CSC III.

On appeal, the defendant argued that the trial court erred by instructing the jury on CSC III because it is not a necessarily included lesser offense of CSC I, as charged in this case. The Court of Appeals stated:

“The jury convicted defendant of CSC III, sexual penetration of another person at least thirteen years of age and under the age of sixteen, MCL 750.520d(1)(a). Neither of the charged counts of CSC I includes the element of the victim’s age. Thus, it is possible to commit CSC I under MCL 750.520b(1)(d) or (1)(e) without committing the uncharged offense of CSC III, MCL 750.520d(1)(a). Accordingly, under *Cornell* CSC III, MCL

**People v Cornell*, 466 Mich 335 (2002).

750.520d(1)(a), is not a necessarily included lesser offense of CSC I, MCL 750.520b(1)(d) or (1)(e). Because both offenses require the act of sexual penetration and are of the same category of crimes, CSC III is a cognate lesser offense of CSC I as applied to this case.” *Apgar, supra* at ____.

Although the Court found CSC III is not a necessarily included lesser offense of CSC I, the Court affirmed the defendant’s conviction. The Court concluded that the defendant was not deprived of due process when the trial court instructed the jury on CSC III over defense counsel’s objection. According to the Court, “defendant was not deprived of due process because all of the elements of the uncharged crime [CSC III] were proved at the preliminary examination and trial without objection, providing defendant adequate notice.” *Apgar, supra* at ____.

Judge Murphy concurred in the majority’s conclusion that, as charged in this case, CSC III is a cognate lesser offense of CSC I but dissented from the majority’s affirmance of defendant’s conviction. Judge Murphy found no support in case law for “the position that a cognate lesser offense instruction may still be permissible or allowed to stand if due process rights are not offended and there exists evidence to support a finding of guilt for the cognate lesser offense.” *Apgar, supra* at ____ (Murphy, J, concurring in part and dissenting in part).